No. 86-228

In the Supreme Court of the United States

OCTOBER TERM, 1986

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SAMUEL ROSENTHAL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner made material misrepresentations of fact in his visa application and in his citizenship petition and allied documents, requiring his denaturalization under 8 U.S.C. 1451(a).

2. Whether the court of appeals failed to comply with Fed. R. Civ. P. 52(a) in reviewing the district court's factual findings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-228

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 793 F.2d 516. The opinion of the district court (Pet. App. 39a-137a) is reported at 571 F. Supp. 1104.

JURISDICTION

The judgment of the court of appeals (Pet. App. 38a) was entered on June 20, 1986. The petition for a writ of certiorari was filed on August 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The government brought this denaturalization suit against petitioner under 8 U.S.C. 1451(a)(1), claiming that petitioner's citizenship was illegally procured and was obtained by concealment of a material fact. The government alleged that (1) petitioner participated with Nazi occupation forces in Lithuania in the execution of more than 2,000 unarmed Lithuanian civilians in July and August 1941; (2) petitioner misrepresented certain material facts in his visa application and in his naturalization petition and allied documents, such as his date and place of birth, and his occupation and residence during World War II; and (3) petitioner lacked "good moral character," under 8 U.S.C. 1101(f)(6) and 1427(a) and (d), at the time he applied for citizenship, because he committed the above atrocities and because he gave false testimony to obtain a visa and his citizenship. Following a bench trial, the district court ruled in petitioner's favor, finding that the government had failed to prove the allegations in its complaint (Pet. App. 39a-137a). The court of appeals reversed (Pet. App. 1a-37a).

1. Petitioner lived in Kedainiai, Lithuania, in 1941 when Nazi forces invaded that area. In July and August of that year, as part of a large-scale operation to exterminate the Eastern European Jewish population, the Nazis, aided by members of certain local civilian organizations, forced more than 2,000 unarmed Jewish men, women, and children in Kedainiai to undress and enter a ditch, where they were shot and their bodies were covered with lime (Pet. App. 48a-62a, 69a-73a).[1] During that two

[1] Nazi commando units responsible for the operations sometimes used local people to assist them in such killings (Pet. App. 50a-51a, 52a, 55a, 57a-58a, 62a).

month period, petitioner worked for the Bank of Lithuania in Kedainiai, where he remained until October 1941 (*id.* at 7a, 111a). Petitioner was also a member of the Sauliai, a local association which trained its members in military matters and served as an auxiliary police force assisting the Nazi occupation forces (*id.* at 7a, 70a, 109a).[2] After leaving Kedainiai, petitioner moved to Kaunas, Lithuania, where he worked in a small brush and broom factory. In October 1944, petitioner and his wife left Lithuania as the Soviet Army advanced. From Lithuania they moved to Tuebingen, in Nazi-occupied Germany. There, petitioner was given permission by the Nazi regime to live without restrictions, and his wife applied for permission to practice dentistry. Petitioner and his wife remained in the Tuebingen area until Allied Forces occupied the area in May 1945 (*id.* at 7a, 115a-117a).

In January 1947, petitioner and his wife applied at the American consulate in Stuttgart, Germany, for a nonpreference quota immigration visa (Pet. App. 118a). Although petitioner had given the Nazi authorities in Tuebingen his true date and place of birth and his true wartime occupations, he gave the American consulate officials false information regarding each of those items when he applied for a visa. In addition, petitioner falsely claimed that he had not resided in Kedainiai in July and August 1941, when the mass executions took place. Petitioner also supplied the consulate officials with four false documents: a forged Lithuanian identity card, a false

---

[2] Petitioner also had received military training before the Nazi occupation, and he left Lithuanian military service with the rank of junior lieutenant in late 1939 (Pet. App. 7a).

birth certificate, a police certificate, and a certificate stating that he had been persecuted by the Gestapo. Each of these documents contained a false date and place of birth (*id.* at 7a, 118a).[3] Based on the information supplied by petitioner, the consulate issued him a visa in March 1948, and he entered the United States the following month (*id.* at 3a, 120a). On a form petitioner executed the following month to gain admission into the United States, he again misrepresented the date and place of his birth (*id.* at 120a), and he repeated those misrepresentations in his application to file a petition for naturalization, in the petition itself, and during a naturalization examination, all in October 1953 (*id.* at 120a-121a). Petitioner was naturalized in 1954 (*ibid.*).

2. At trial, the government sought to establish that petitioner participated in the mass executions in Kedainiai by introducing videotaped depositions conducted in the Soviet Union of witnesses and participants who had observed the killings (Pet. App. 4a).

---

[3] Petitioner suggests (Pet. 12 & n.6) that he falsified such facts to avoid conscription into the German Army, and not out of any intent to conceal his true identity. That claim, however, scarcely explains his decision to misrepresent his true birth place to the American consulate authorities, but not to the Nazi administration in Tuebingen. Petitioner's account also fails to explain why he initially denied making any msrepresentations. See Pet. App. 7a, 113a (finding that petitioner's stated reason for using false information was "in apparent conflict with" an earlier statement he made).

Petitioner asserts (Pet. 19) that the court of appeals misread the record in concluding that he gave his correct date of birth to Nazi authorities. In fact, the district court reached the same conclusion, finding that the records from Tuebingen "all reflect" petitioner's true place of birth and that "most" also reflect his correct date of birth (Pet. App. 117a).

The district court limited the purpose for which the depositions would be admitted. The court admitted the depositions to establish that the mass murders had occurred in Kedainiai during July and August 1941. However, the court believed that it would be unfair to admit the depositions to identify petitioner in the mass murders, because of the manner in which the depositions were taken in the Soviet Union. The court therefore refused to allow the depositions to be introduced to prove that petitioner had participated in those events (Pet. App. 86a, 108a-109a).

On the merits, the district court ruled, first, that petitioner's citizenship was not "illegally procured," within the meaning of 8 U.S.C. 1451(a) (Pet. App. 122a-124a). The court found that the government had failed to prove by clear and convincing evidence that petitioner had participated in the Kedainiai murders (*id.* at 122a-123a). Second, the district court ruled that petitioner's citizenship was not "procured by concealment of a material fact or by willful misrepresentation," within the meaning of 8 U.S.C. 1451(a). Although the court found that petitioner had made false statements in the course of obtaining his citizenship, the court held that those false statements were not "material" as that term was construed in *Chaunt* v. *United States*, 364 U.S. 350 (1960), and by the separate opinions in *Fedorenko* v. *United States*, 449 U.S. 490 (1981) (Pet. App. 124a-137a). The court determined that none of the true facts, if known, would have warranted the denial of citizenship or would have made petitioner ineligible for a visa (*id.* at 135a). In addition, the court concluded that petitioner's disclosure in his visa application of the true facts would not have prompted an investigation by the American consulate officials into

petitioner's background or the accuracy of his representations (*id.* at 136a-137a). Accordingly, the court entered judgment for petitioner.

3. The court of appeals reversed (Pet. App. 1a-37a). The court did not decide whether the depositions should have been admitted to prove that petitioner was responsible for the Kedainiai murders (*id.* at 6a & n.2), because it held that petitioner's misrepresentations were material under the standards set forth in this Court's decision in *Chaunt* (*id.* at 8a-23a, 28a-37a). Relying on the testimony of Vice-Consul Seymour Finger, who was responsible for issuing such visas and who testified about the procedures followed when petitioner applied for a visa (*id.* at 29a), the court concluded that an investigation would have been conducted into petitioner's background if he had truthfully identified his date and place of birth. That investigation, the court explained, probably would have revealed that petitioner had not been a victim of persecution. Being a victim of persecution, the court stated, was necessary to obtain the nonpreference visa that petitioner procured (*id.* at 30a-33a). The court also concluded that if petitioner's earlier misrepresentations had been revealed in the course of his naturalization proceedings, it would have resulted in "either a field investigation or an outright denial of the petition" (*id.* at 36a). In either case, the court concluded that petitioner's misrepresentations at the visa and naturalization stages were material (*id.* at 37a).

ARGUMENT

1. Petitioner concedes that he misrepresented certain facts in his visa application and in his citizenship petition, but he argues (Pet. 7-11) that the court of appeals applied the wrong standard to determine whether those misrepresentations were material under 8 U.S.C. 1451(a). That claim does not warrant review by this Court.

Section 1451(a) provides that a certificate of naturalization is invalid if it was procured, inter alia, "by concealment of a material fact." The leading case for determining whether a misrepresentation is material is *Chaunt* v. *United States*, 364 U.S. 350 (1960).[4] Chaunt falsely stated in his petition for citizenship that he had never been arrested, and the government sought to revoke his citizenship. This Court held that Chaunt's falsehoods were not material, for two reasons.

First, the Court concluded that Chaunt's three prior arrests for distributing handbills, making a speech, and a breach of the peace "were not reflections on the character of the man seeking citizenship" (364 U.S. at 353). The offenses predated the five-year statutory period during which an applicant must have " 'behaved as a person of good moral character' " to become a citizen (*ibid.* (citation omitted)). Moreover, none of Chaunt's crimes involved "moral turpitude" or "conduct which even peripherally touched types of activity which might disqualify one from citizenship." On the contrary, they were "of extremely slight consequence" (*id.* at 354). Second, the Court rejected the government's argument that

---

[4] The question of the proper materiality standard was also before the Court in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), but the Court did not reach the issue in that case.

Chaunt's falsehood denied the government the opportunity to conduct an investigation that might have revealed that Chaunt was associated with the Communist Party, which was also a disqualifying fact. The Court rejected that argument because, given the three crimes in question, the government's proposed line of investigation was "tenuous," and because Chaunt had disclosed on his petition that he was a member of an organization that the government then believed to be controlled by the Communist Party (*id.* at 355). Accordingly, the Court concluded that the government had failed to show by clear and convincing evidence "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (*ibid.*).

Petitioner contends (Pet. 9) that the appropriate formulation of the materiality standard is one that requires the government to demonstrate the existence of ultimate disqualifying facts. That argument is based on a misreading of *Chaunt*. Although the first *Chaunt* test requires the government to establish the existence of ultimate facts rendering a person ineligible for citizenship, the second test is not as exacting. Under the second test, a misrepresentation is material if the truth, while not itself a ground for the denial of citizenship, would have prompted an investigation that might have uncovered disqualifying facts.[8] Petitioner's proposed standard would render

[8] Indeed, by requiring the government to prove that disqualifying facts probably would have been uncovered, the court of appeals applied a standard that is more generous to petitioner than the one this Court adopted in *Chaunt*.

the second *Chaunt* standard a meaningless duplication of the first. Moreover, petitioner's standard would leave an applicant with much to gain and little to lose by lying about his background in an effort to avoid an investigation that might lead to a denial of citizenship. Not only will the passage of time make any investigation more difficult, but also in the interim the burden of proof will have shifted from the applicant to the government, which must demonstrate ineligibility in a denaturalization proceeding by clear and convincing evidence. Finally, the materiality standard petitioner suggests is inconsistent with the materiality standard that applies to other statutes, which require the government to prove only that a false statement was capable of influencing a governmental function, not that the government was in fact injured. See, *e.g.*, *United States* v. *Notarantonio*, 758 F.2d 777, 785-786 (1st Cir. 1985) (collecting cases) (federal false statement statute, 18 U.S.C. 1001); *United States* v. *Moore*, 613 F.2d 1029, 1038 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980) (federal false declarations statute, 18 U.S.C. 1623); *United States* v. *Romanov*, 509 F.2d 26, 28 (1st Cir. 1975) (federal tax false statement statute, 26 U.S.C. 7206); *United States* v. *Masters*, 484 F.2d 1251, 1254 (10th Cir. 1973) (federal perjury statute, 18 U.S.C. 1621).

Petitioner also asserts (Pet. 7-11) that review by this Court is necessary to resolve a conflict among the circuits on the proper interpretation of the second *Chaunt* test. This case, however, does not require a resolution of the conflict, because this case would be decided the same way under any circuit's definition of materiality. Even under the most stringent materiality test, petitioner was not entitled to citizenship, because the record shows that his full disclosure

would have led to disqualification under the first *Chaunt* standard.

Petitioner misrepresented both his date and place of birth and his wartime residences to the American consulate officials in Stuttgart; the documentation petitioner supplied also contained misrepresentations. In his application to file a petition for naturalization, petitioner again misrepresented his date and place of birth. More importantly, he misrepresented that he had never previously given false testimony to obtain benefits under the immigration laws (Pet. App. 120a). Petitioner also misrepresented his date and place of birth in his petition for naturalization.[6] And at his naturalization examination, petitioner misrepresented that the contents of his application and petition were true (*id.* at 120a-121a).

These misrepresentations would have led to petitioner's disqualification. Vice-Consul Finger testified that any visa application would have been denied if the applicant lied concerning his wartime residences (C.A. App. 752) and would "routine[ly]" have been denied had there been a showing that the applicant "lied about his date and place of birth to the United States officials, but had, prior to making application, told German officials in another part of the country the truth regarding these matters" (*id.* at 753). Judge Julius Goldberg, the immigration judge who served as petitioner's naturalization examiner, tesitfied that he would have recommended against petitioner's naturalization or would have directed an investigation if he had known that petitioner had sworn

---

[6] Petitioner's claim that a number of applicants lacked "authentic birth certificates" (Pet. 17) ignores the crucial distinction between persons lacking *authentic* documents and those tendering *forged* documents.

to those falsehoods (Pet. App. 36a). Thus, petitioner's statement in his naturalization application that he had not previously given false testimony to obtain immigration benefits was both manifestly false and material, because it served to conceal petitioner's pattern of lying to American officials from the outset of his efforts to emigrate to this country. That is not to say that each separate false statement made by petitioner was necessarily material simply because it showed that petitioner had misrepresented the truth. Rather, the representation that he had not previously lied to consulate and immigration officials was material because it concealed a pattern of sworn falsehoods throughout the visa and naturalization process that the evidence at trial established would have led to denial of petitioner's naturalization.[7]

In any event, the conflict among the circuits alleged by petitioner is more apparent than real. Most of the decisions cited by petitioner apply either the same standard adopted by the court of appeals here or a standard that is more favorable to the government.[8]

---

[7] Although both courts below concluded that the government did not satisfy the first *Chaunt* standard, neither court discussed the above testimony by Vice-Consul Finger, and the district court totally overlooked the testimony of petitioner's naturalization examiner.

[8] Compare Pet. App. 22a (materiality is established when the disclosure of concealed information probably would have led to the discovery of facts warranting the denial of citizenship) and *Maikovskis* v. *INS*, 773 F.2d 435, 442 (2d Cir. 1985), cert. denied, No. 85-1483 (June 16, 1986) (same), with *United States* v. *Koziy*, 728 F.2d 1314, 1320 (11th Cir.), cert. denied, 469 U.S. 835 (1984) (materiality is established when the disclosure of concealed information might have led to the discovery of facts warranting the denial of citizenship); *United States* v. *Fedorenko*, 597 F.2d 946, 947, 951 (5th Cir.

To be sure, the Tenth Circuit in *United States* v. *Sheshtawy*, 714 F.2d 1038 (1983), stated that the government must satisfy the more stringent standard that petitioner proposes here. In that case, however, the government could not have sustained its burden under the most lenient standard followed by other courts of appeals, since the government did not reasonably identify what disqualifying facts an investigation might have revealed.[9] Since this Court's decision in *Chaunt* does not allow the government to engage in such unfocused speculation (see 364 U.S. at 354-355), the Tenth Circuit's decision to adopt a more stringent standard of materiality was unnecessary to its decision. Similarly, although the Ninth Circuit in *La Madrid-Peraza* v. *INS*, 492 F.2d 1297 (1974),

---

1979), aff'd on other grounds, 449 U.S. 490 (1981) (same); *Kassab* v. *INS*, 364 F.2d 806, 807 (6th Cir. 1966) (same); and *Langhammer* v. *Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961) (same). Petitioner also alleges that the Third Circuit's decision here conflicts with that court's earlier decisions, but that claim is for the Third Circuit, not this Court, to resolve.

[9] In *Sheshtawy*, the alien was arrested for concealing stolen property three weeks before a rescheduled naturalization hearing. Shortly thereafter, the alien stated on a standard INS form questionnaire that he had never been arrested. The state charges against the alien were dismissed at a preliminary hearing shortly after he was naturalized, on the ground that no crime had been committed. The government did not claim that the arrest itself would have warranted the denial of citizenship; as far as the court's opinion discloses, the government also did not argue that the falsehood itself would have led to the denial of citizenship, or identify what facts might have been revealed by an investigation. 714 F.2d at 1039-1040. Under those facts, which more closely resemble the facts of *Chaunt* than the facts of this case, the court's judgment would have been the same regardless of the standard of materiality the court selected.

and *United States* v. *Rossi*, 299 F.2d 650 (1962), stated that the government must satisfy the higher standard of materiality that petitioner proposes, those were cases in which the first *Chaunt* standard was relevant, rather than the second, since the government did not allege in either case that it would (or could) have carried out an investigation into the alien's bona fides.[10] Accordingly, the stricter standard articulated by the Ninth and Tenth Circuits was not necessary to the outcomes in those cases. We therefore submit that it is appropriate for this Court to await further consideration of the issue in those circuits before undertaking to resolve the conflict over the proper interpretation of the materiality requirement in *Chaunt*.

2. Petitioner also contends (Pet. 14-27) that the court of appeals disregarded Fed. R. Civ. P. 52(a) when it concluded that his disclosure of the true

---

[10] In *La Madrid-Peraza*, the alien falsely overstated the wages she was to receive from employment as a live-in domestic, but the court of appeals reversed her deportation order on the ground that the government failed to prove that the wages the alien actually received were below the prevailing wage rates in the Los Angeles area for such employment. 492 F.2d at 1298. In *Rossi* the defendant (an Italian) posed as his brother (a Chilean) to avoid an immigration quota. The court of apeals refused to order his naturalization certificate revoked because the government failed to prove that there was in fact an immigration quota that would have barred the defendant's entry. 299 F.2d at 653-654. In neither case did the government argue that a further investigation would have disclosed disqualifying facts; rather, the government's argument was essentially that the falsehood itself was disqualifying. That type of argument rests on the first *Chaunt* test, not the second. Accordingly, neither decision involved the type of misrepresentation that is at issue in this case.

facts in his visa application would have led to an investigation.[11] That fact-bound claim does not merit review by this Court. In any event, the record conclusively shows that an investigation would have been conducted. As noted above, former Vice-Consul Finger and Judge Goldberg testified that misrepresentations like those made by petitioner would have triggered an investigation (Pet. App. 36a-37a). The district court erred by focusing on the facts contained in a truthful answer by petitioner, rather than on the fact that a truthful answer at any stage of the immigration and naturalization process would have shown that the documentation petitioner had previously supplied as well as his previous representations contained falsehoods. Because the district court's legal analysis was flawed, and because the evidence was clear that an investigation would have been performed if petitioner's falsehoods had come to light, the court of appeals did not err by itself concluding that petitioner's misrepresentations would have prompted an investigation (see *Pullman-Standard* v.

---

[11] Petitioner errs in asserting (Pet. 24) that the court of appeals relied on a basis for denaturalization not contained in the government's complaint, in violation of *Schneiderman* v. *United States*, 320 U.S. 118 (1943). There, the government alleged that the defendant had illegally obtained citizenship by failing to behave in a manner demonstrating allegiance to the Constitution for the statutory period (*id.* at 121). Given that allegation, this Court refused to allow the government also to claim that denaturalization was appropriate because the oath of allegiance taken by the defendant was false (*id.* at 159-160). By contrast, here the complaint alleged that petitioner obtained his citizenship through misrepresentations, such as those relating to his date and place of birth (see Pet. App. 122a-124a).

Swint, 456 U.S. 273, 292 (1982) (when "findings are infirm because of an erroneous view of the law," but "the record permits only one resolution of the factual issue," a remand is unnecessary)).

Petitioner also argues (Pet. 16-18) that the court of appeals was wrong in concluding that he would have been denied a visa if it had been discovered that he was not a victim of persecution, as he claimed. In fact, however, the testimony of Vice-Consul Finger squarely supports the court of appeals' conclusion on this issue. As Vice-Consul Finger explained, the certificate that petitioner submitted stating that he was persecuted by the Gestapo was "[v]ery significant, because the policy under which we operated emphasized that visas would be granted to persons otherwise eligible who are victims of Nazi persecution" (C.A. App. 748). See also *id.* at 736, 738-739, 766 ("the policy was to issue visas to those who had been persecuted by the Nazis"), 767 ("at that time, January, 1947, those were the only two categories [to receive visas], either first preference visas or victims of persecution"), 768, 770-771, 781-782, 788. Petitioner's argument that the vice-consul should be disbelieved ignores this Court's admonition that "uncontroverted testimony" about how the immigration laws were interpreted in such circumstances by the officials who administered them is entitled to weight (*Fedorenko*, 449 U.S. at 511). Moreover, in assessing the likelihood that an investigation would have revealed that petitioner was not a victim of persecution, it was reasonable for the court of appeals to conclude that a victim of persecution would not have received an unrestricted permit to live in Germany in 1944, and that his spouse would not have openly applied for permission to practice dentistry. The court of

appeals' determinations are therefore fully consistent with Rule 52(a), and further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SAMUEL ROSENTHAL
Attorney

OCTOBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 40038